A

CHANG SHU HUA

v.

GOON FOOK HONG

B

COURT OF APPEAL, PUTRAJAYA
HELILIAH YUSOF JCA
ABDUL MALIK ISHAK JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-1263-2004]

C

8 FEBRUARY 2008

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Jurisdiction of Court of Appeal - Whether orders made by one Court of Appeal could be set aside by another Court of Appeal*

D

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Court of Appeal judgment - Jurisdiction - Procedure - Whether application for stay had to be made in Federal Court and not in Court of Appeal*

E

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Merits - Whether insufficient material to establish special circumstances*

CIVIL PROCEDURE: *Judicial precedent - Co-ordinate jurisdiction, court of - Court of Appeal - Whether orders made by one Court of*

F

Appeal could be set aside by another Court of Appeal

CIVIL PROCEDURE: *Jurisdiction - Setting aside judgment - Court of co-ordinate jurisdiction - Whether orders made by one Court of Appeal could be set aside by another Court of Appeal*

G

On 15 November 2006, another panel of this court heard the parties and gave its decision, which contained certain orders that have since been perfected. Aggrieved by the decision, the defendant/respondent filed a notice of motion to this court in encl. 31a seeking that the Court of Appeal judgment either be vacated

H

or stayed pending disposal of his appeal to the Federal Court. The respondent questioned the legality of the orders contained in the Court of Appeal judgment of 15 November 2006 and urged this court to acknowledge that the judgment was erroneous. The plaintiff/appellant, on the other hand, submitted that no special

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circumstances had been shown by the respondent to enable this court to grant the stay in question.

Held (dismissing the notice in motion in encl. 31a for prayers (i) and (ii))
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) This panel of the Court of Appeal of co-ordinate jurisdiction certainly had no jurisdiction to grant prayer (i) of the notice in motion in encl. 31a seeking an order to vacate the Court of Appeal judgment of 15 November 2006. The orders made by one Court of Appeal cannot be set aside by another Court of Appeal in the context of ss. 43 and 44 of the Courts of Judicature Act 1964. *Penang Port Commission v. Kanawagi Seperumaniam* (foll). Further, only the Federal Court has the jurisdiction to grant the stay as sought for in prayer (ii) of the notice of motion in encl. 31a. The application for stay had to be made in the Federal Court and not in the Court of Appeal. *Neduncheliyan Balasubramaniam v. Kohlia Shanmugam* (foll). Even if this panel were to hear the merits of the stay application in prayer (ii), there was insufficient material, on the facts, to establish special circumstances in favour of the respondent. (paras 8, 9 & 10)

Bahasa Malaysia *Translation Of Headnotes*

Pada 15 November 2006, satu panel yang lain mahkamah ini telah mendengar pihak-pihak dan memberikan keputusannya yang mengandungi beberapa perintah yang kemudiannya telah disempurnakan. Terkilan dengan keputusan itu, defendan/responden memfail notis usul ke mahkamah ini di lampiran 31a memohon sama ada keputusan Mahkamah Rayuan dilupuskan, ataupun digantung sementara menunggu keputusan rayuannya ke Mahkamah Persekutuan. Responden mempersoalkan kesahan perintah-perintah yang terkandung di dalam keputusan Mahkamah Rayuan bertarikh 15 November 2006 dan meminta mahkamah ini untuk menmperaku bahawa keputusan tersebut adalah salah. Plaintif/perayu sebaliknya berhujah bahawa tiada keadaan istimewa telah dibuktikan oleh responden bagi membolehkan mahkamah ini membenarkan penggantungan yang dipohon.

A **Diputuskan (menolak notis usul di lampiran 31a bagi prayer (i) dan (ii))**
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

B **(1)** Panel Mahkamah Rayuan dengan bidangkuasa sama taraf di sini jelas tidak mempunyai bidangkuasa untuk membenarkan prayer (i) di dalam notis usul di lampiran 31a yang memohon perintah untuk melupuskan keputusan Mahkamah Rayuan bertarikh 15 November 2006. Perintah-perintah yang dibuat
C oleh sebuah Mahkamah Rayuan tidak boleh diketepikan oleh sebuah Mahkamah Rayuan yang lain di dalam konteks ss. 43 dan 44 Akta Mahkamah Kehakiman 1964. *Penang Port Commission v. Kanawagi Seperumaniam* (diikuti). Selain itu, hanya Mahkamah Persekutuan sahaja yang mempunyai
D bidangkuasa untuk membenarkan penggantungan seperti yang dipohon oleh prayer (ii) notis usul di lampiran 31a. Permohonan untuk penggantungan harus dibuat di Mahkamah Persekutuan dan bukannya di Mahkamah Rayuan. *Neduncheliyan Balasubramaniam v. Kohlia Shanmugam* (diikuti). Jikapun panel
E ini mendengar merit permohonan penggantungan di prayer (ii), tiada material yang mencukupi, berdasarkan fakta, untuk membuktikan keadaan istimewa bagi manfaat responden.

Case(s) referred to:
American Cyanamid v. Ethicon Ltd [1975] AC 396 ***(refd)***
F *Atkins v. The Great Western Railway Company [1886] 2 TR 400* ***(refd)***
Attorney-General v. Emerson [1890] 24 QBD 56 ***(refd)***
Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman & Ors [1987] 2 MLJ 633 ***(refd)***
G *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC* ***(refd)***
Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 ***(refd)***
Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors (No 2) [1989] 1 CLJ 183; [1989] 1 CLJ (Rep) 436 HC ***(refd)***
Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***
H *Dr Kok Chee Min v. Kan Choy Yoong & Ors [1994] 3 MLJ 210* ***(refd)***
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 CA ***(refd)***
Government of Malaysia v. Datuk Hj Kadir Mohamad Mastan & Another Application [1993] 4 CLJ 98 HC
Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***
I *Horwood v. Millar's, etc. Co [1917] 1 KB 305* ***(refd)***
In re Beard [1908] 1 Ch 383 ***(refd)***
In re Meyrick's Settlement [1921] 1 Ch 311 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Leong Chee Kong & Anor v. Tan Leng Kee (No 2) [2001] 5 CLJ 408 HC ***(refd)***
Marlborough v. Marlborough [1901] 1 Ch 165 ***(refd)***
Neduncheliyan Balasubramaniam v. Kohila Shanmugam [1997] 4 CLJ 676 CA ***(foll)***
Neville v. Dominion of Canada News Co Ltd [1915] 3 KB 556 ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Monk v. Bartram [1891] 1 QB 346 ***(refd)***
Penang Port Commission v. Kanawangi Seperumaniam [2003] 1 CLJ 819 FC ***(foll)***
Penang Port Commission v. Kanawangi Seperumaniam [1997] 1 CLJ 423 CA ***(refd)***
Printing, etc. Co v. Sampson [1875] LR 19 Eq 462 ***(refd)***
Re Flatau ex p Scotch Whisky Distillers Ltd [1889] 22 QBD 83 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Lim Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***
Russell v. Russell [1924] AC 687 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Wilson v. Church (No 2) [1879] 12 Ch D 454 ***(refd)***
Wilson v. Carnley [1908] 1 KB 729 ***(refd)***
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 43, 44, 73, 97(2), 102
Rules of the Court of Appeal 1994, rr. 2, 4, 13
Rules of the High Court 1980, O. 47 r. 1(1), O. 56 r. 1(4), O. 92 r. 4
Subordinate Courts Rules 1980, O. 49 r. 4

Other source(s) referred to:

Halsbury's Laws of England, vol 13, 4th edn, p 272, para 455

For the plaintiff/appellant - Lum Chee Seng; M/s Lum Chee Seng & Assoc
For the defendant/respondent - Yusuf Khan Ghows Khan (Fong Teng Fook with him); M/s Yusuf Khan & Fong

Reported by Suresh Nathan

A

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

B **[1]** On 15 November 2006, another panel of this court heard the parties and gave the decision (referred to as the "Court of Appeal judgment of 15 November 2006"). It contained certain orders which have since been perfected (see the order in exh. "GFH1" annexed to the affidavit of Goon Fook Hong – the C defendant respondent). In its original text, the Court of Appeal judgment of 15 November 2006 was worded as follows:

PERINTAH

D RAYUAN ini ditetapkan untuk bicara pada hari ini dalam kehadiran Encik Lum Chee Seng, Peguamcara bagi pihak Perayu, dan Encik Fong Teng Fook, Peguamcara bagi pihak Responden DAN SETELAH MENDENGAR hujah kedua-dua Peguamcara tersebut di atas MAKA ADALAH DIPERINTAH bahawa:

E (a) Dengan persetujuan, Perintah Mahkamah Tinggi bertarikh 27 Oktober 2004 diketepikan.

(b) Perkara dalam Saman Pemula bertarikh 8 haribulan Julai 2004 tersebut dikembalikan ke Mahkamah Tinggi Kuala Lumpur untuk bicara secara keterangan viva voce berkenaan dengan nafkah isteri F sahaja.

(c) Responden hendaklah membayar kepada Perayu nafkah isteri interim sebanyak Ringgit Malaysia Enam Ribu (RM6,000.00) sahaja sebulan dari bulan November 2006 sehingga perkara dalam Saman Pemula bertarikh 8 haribulan Julai 2004 tersebut berkenaan G dengan nafkah isteri diputuskan dan diselesaikan oleh MahkamahTinggi Kuala Lumpur.

(d) Responden hendaklah membayar kepada Perayu tunggakan nafkah isteri dikira RM6,000.00 sebulan dari tarikh Saman Pemula, iaitu dari 8 haribulan Julai 2004 sehingga bulan Oktober 2006 H yang berjumlah Ringgit Malaysia Seratus Enam Puluh Lapan Ribu (RM168,000.00) sahaja pada atau sebelum 1 haribulan Mac 2007.

(e) Kos hendaklah mengikut keadaan kes yang diperintahkan untuk bicara semula.

I (f) Deposit sebanyak RM500.00 dikembalikan kepada Perayu.

[2] The English language translation of the Court of Appeal judgment of 15 November 2006 may be stated in this way:

ORDER

This APPEAL is fixed for hearing on this day in the presence of Encik Lum Chee Seng, of counsel for the Appellant and Encik Fong Teng Fook, of counsel for the Respondent AND AFTER HEARING the submissions of both counsel IT IS HEREBY ORDERED that:

(a) By consent, the order of the High Court dated 27.10.2004 is set aside.

(b) The matter pertaining to the originating summons dated 8.7.2004 to be remitted to the High court for re-trial by viva voce evidence on the issue of maintenance for the wife (plaintiff appellant) only.

(c) The defendant respondent is to pay an interim maintenance of RM6,000.00 per month to the plaintiff appellant from November 2006 until the disposal of the High Court originating summons dated 8.7.2004 in regard to the wife's maintenance.

(d) The defendant respondent is to pay maintenance in arrears to the wife (plaintiff appellant) on or before 1.3.2007 in the sum of RM6,000.00 per month from the date of the originating summons, that is, 8.7.2004 to October 2006 in the total sum of RM168,000.00.

(e) Costs to follow the event at the re-trial.

(f) Deposit in the sum of RM500.00 to be returned to the plaintiff appellant.

[3] Aggrieved by the Court of Appeal judgment of 15 November 2006, Goon Fook Hong – defendant respondent, filed a notice of motion to this court in encl. 31a and sought for the following orders:

(i) that the Order of the Court of Appeal dated 15.11.2006 which states that the Respondent is required to pay interim maintenance in arrears to the Appellant on or before 1.3.2007 in the sum of RM6,000.00 per month from the date of the Originating Summons (i.e. 8.7.2004) to October 2006 in the total sum of RM168,000.00; and the Respondent is to pay an interim maintenance of RM6,000.00 per month to the Appellant from November 2006 until the disposal of the High Court Originating Summons dated 8.7.2004, be vacated;

A (ii) alternatively, that the execution of the Court of Appeal Order dated 15.11.2006 which states that the Respondent is required to pay an interim maintenance in arrears to the Appellant on or before 1.3.2007 in the sum of RM6,000.00 per month from the date of the Originating Summons (i.e.8.7.2004) to October 2006 in the total sum of RM168,000.00; and the Respondent is to pay B an interim maintenance of RM6,000.00 per month to the Appellant from November 2006 until the disposal of the High Court Originating Summons dated 8.7.2004 be stayed pending disposal of the appeal to the Federal Court pursuant to Section 102 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of C this Honourable Court;

(iii) that costs be borne by the Respondent; and

(iv) such other or further relief as this Honourable Court deems fit.

D

[4] In the meantime, the defendant respondent has obtained leave from the Federal Court *vide* Federal Court civil application no: 02-38-2007(W). The matter before the Federal Court is still pending.

E

Arguments Of The Parties

[5] Before us, the learned counsel for the defendant respondent questioned the legality of the orders contained in the Court of Appeal judgment of 15 November 2006 and urged this court to F acknowledge that the judgment was erroneous. Alternatively, a stay was asked for pending disposal of the appeal to the Federal Court.

[6] The learned counsel for the plaintiff appellant pointed out G that the orders of the Court of Appeal judgment of 15 November 2006 were only complied on two occasions – in the months of November 2006 and December 2006, but thereafter the defendant respondent refused to comply. He also submitted that no special circumstances have been shown in the affidavit of defendant H respondent to enable this court to grant the stay pending disposal of the appeal to the Federal Court.

Analysis

[7] The notice of motion in encl. 31a was supported by an I affidavit in encl. 31b. That affidavit in support was affirmed by Goon Fook Hong – the defendant respondent, on 1 March 2007. Enclosure 31b challenged the orders of the Court of Appeal

judgment of 15 November 2006 and all the averments therein were meant for the consumption of the Federal Court and not this court. I shall not waste precious time to regurgitate those averments here. They can be seen in encl. 31b. Suffice for me to say that questions of law were framed in encl. 31b for determination by the Federal Court and those questions of law may be stated as follows (see para. 20 of encl. 31b):

> (i) Whether the Court of Appeal having disposed of the appeal before it by remitting the subject matter of the said appeal to the High Court for trial and decision by *viva voce* evidence may, pending such hearing and decision make an interim order in regard to the said subject matter?
>
> (ii) Whether the Court of Appeal after having remitted the subject matter of an appeal before it for trial before the High Court is *functus officio* in relation thereto?
>
> (iii) Whether the subject matter of an appeal before the Court of Appeal ceased to be pending before it upon the Court of Appeal having remitted the same for trial and decision by the High Court?

[8] This panel of the Court of Appeal of coordinate jurisdiction certainly has no jurisdiction to grant prayer (i) of the notice of motion in encl. 31a. That prayer (i) sought an order to vacate the Court of Appeal judgment of 15 November 2006. We are bound by the decision of the Federal Court in *Penang Port Commission v. Kanawagi s/o Seperumaniam* [2003] 1 CLJ 819 which states that the orders made by one Court of Appeal cannot be set aside by another Court of Appeal in the context of ss. 43 and 44 of the Courts of Judicature Act 1964.

[9] Prayer (ii) of the notice of motion in encl. 31a sought for a stay of execution of the order of the Court of Appeal judgment of 15 November 2006 pending disposal of the appeal to the Federal Court. If this court were to entertain prayer (ii) of the notice of motion in encl. 31a this panel would in effect be interfering with the decision of another panel of this court. That cannot be right. Only the Federal Court has the jurisdiction to grant the stay as sought for in prayer (ii) of the notice of motion in encl. 31a. In *Neduncheliyan Balasubramaniam v. Kohila a/p Shanmugam* [1997] 4 CLJ 676, the Court of Appeal held that the application for stay had to be made in the Federal Court and not

in the Court of Appeal. It must be borne in mind "that the Court of Appeal possesses only appellate jurisdiction" (to borrow the words of Augustine Paul FCJ in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 at 196).

[10] Even if this panel were to hear the merits of the stay application in prayer (ii) of the notice of motion in encl. 31a, there were insufficient materials to establish special circumstances in favour of the defendant respondent. The reasons advanced by the defendant respondent in the affidavit in encl. 31b to support the stay may be summarised as follows:

(a) that he is filing an appeal to the Federal Court;

(b) that he is unable to comply with the interim order of the other panel of this court dated 15 November 2006;

(c) that he is questioning the merits of the interim order of the other panel of this court dated 15 November 2006; and

(d) that he has two "fears" to overcome: firstly, the fear of facing committal proceeding; secondly, the fear that his children's education may come to an abrupt end.

[11] All these reasons cannot and do not constitute special circumstances to warrant a stay. The reasons also do not relate to the enforcement of the judgment (*Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA, and [2002] 3 MLJ 49 CA; and *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 FC, and [2004] 1 MLJ 257 FC). A string of authorities has established that the merits of the appeal is not a special circumstance to justify a stay. In *Monk v. Bartram* [1891] 1 QB 346, Lord Esher MR remarked that "the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the court will grant a stay of execution". Lord Esher MR in *Atkins v. The Great Western Railway Company* [1886] 2 TR 400 aptly said that "… but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so". NH Chan J (as he then was and who later became a Court of Appeal judge) in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40 said at p. 43 of the report that, "… the court is not to have regard to the validity or correctness of the judgment but only to concern itself with the special circumstances which are relevant to the enforcement of the

judgment". And, again, at p. 43 of the report, the learned judge said, "In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances". In *Dr Kok Chee Min v. Kan Choy Yoong & Ors* [1994] 3 MLJ 210, after referring to *Atkins (supra)*, this was what I said at p. 217 of the report, "In my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the appellant a stay of execution". But, going in the opposite direction, some authorities say that the merits of the appeal are crucial factors to decide the fate of the stay. Thus, the Court of Appeal in *Penang Port Commission v. Kanawangi s/o Seperumaniam* [1997] 1 CLJ 423 was of the view that if the appeal has merit then that would be a significant factor to be considered for the granting of a stay. And since the Court of Appeal held that the appellant had "a very powerful appeal", it granted the stay pending disposal of the appeal. Brown J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 was of the view that merit could be taken into account in considering whether to grant a stay. The Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, [1997] 2 CLJ 299 held that merits in the appeal a material factor in deciding whether to grant a stay pending appeal.

[12] On 27 February 2007, the defendant respondent filed a debtor's petition and a short affidavit verifying the debtor's petition as seen in exhibit marked as "GFH2" annexed to the affidavit in encl. 31b. According to Madam Chang Shu Hua – the plaintiff appellant, in her affidavit in reply that was affirmed on 15 March 2007, that the debtor's petition was filed for the purpose of evading payment of wife maintenance to her. According to her the debtor's petition to declare the defendant respondent as a bankrupt was filed *mala fide* and it was meant to defeat the order of the other panel of this court dated 15 November 2006.

[13] The Court of Appeal judgment of 15 November 2006 ordered that the defendant respondent to pay monthly maintenance of RM6,000 per month and the arrears of RM168,000. The defendant respondent in encl. 31b averred that he earned only RM6,000 per month. Whereas the plaintiff appellant in her affidavit in reply averred that the defendant respondent earned approximately RM55,392.66 per month and it

A seemed that the defendant respondent did not deny this figure when the matter came up before the other panel of this court on 15 November 2006.

[14] We refused to grant the stay. No special circumstances have B been shown. It is quite apparent that the defendant respondent is not complying with the Court of Appeal judgment of 15 November 2006 notwithstanding the fact that he earns RM55,392.66 per month. He is defiant and he is, in reality, thumbing at that order. You cannot expect his wife to survive on C "fresh air and sunshine". To add insult to injury, he has now filed a debtor's petition to declare himself a bankrupt. The wife has now taken steps to oppose the debtor's petition before the Shah Alam High Court. There is affidavit evidence to show that he has properties and assets within jurisdiction. Sadly, there is also D affidavit evidence to show that he is keeping a mistress and the adulterous relationship is still ongoing. Meanwhile, the wife had, at one point of time, to return to Taiwan to stay with her parents as she could not afford to stay in Malaysia. She was chased out from the matrimonial home. That matrimonial home has since been E auctioned off because he refused to service the monthly instalments to the financier. She is now back in Malaysia, staying at a hostel belonging to a Lutheran Church at no: 4, Jalan Utara, Petaling Jaya, Selangor. There are three children to the marriage.

[15] The law books are replete with authorities on the subject of F a stay. And provisions on stay of execution of orders or of proceedings are set out in the various rules of courts and the Courts of Judicature Act 1964. For starters, there is O. 49 r. 4 of the Subordinate Courts Rules 1980 which requires a sufficient G cause to be shown before the grant of a stay. Then there is O. 47 r. 1(1) of the Rules of the High Court 1980 ("RHC") where applications for a stay of execution are generally made and it is worded in this way:

> **1 Power to stay execution by writ of seizure and sale H (O. 47 r. 1)**
>
> (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to I execution –
>
> (a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or

(b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the Court thinks fit.

[16] Brown J in *Serangoon Garden Estate Ltd v. Ang Keng (supra)* sets out the rationale for refusing a stay in that "the court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it". And this judgment has been followed and criticised by other judges of which I have more to say later. Next, there is O. 56 r. 1(4) of the RHC which governs an appeal from the registrar to the High Court Judge in chambers and it provides as follows:

1 Appeals from certain decisions of Registrar to Judge in Chambers (O. 56 r. 1)

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

[17] Then there is s. 73 of the Courts of Judicature Act 1964 which governs the stay of execution or of proceedings in appeals from the High Court to the Court of Appeal. That section enacts as follows:

73 Appeal not to operate as stay of execution

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the [Court of Appeal] so orders and no intermediate act or proceeding shall be invalidated except so far as the [Court of Appeal] may direct.

[18] And having the same effect would be r. 13 of the Rules of the Court of Appeal 1994 which states as follows:

13 Stay of proceedings on appeal

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

[19] Rule 2 of the Rules of the Court of Appeal 1994 defines the word "court" to mean the Court of Appeal and includes a judge of that court.

[20] This would be followed by s. 102 of the Courts of Judicature Act 1964 which states that an appeal from the Court of Appeal to the Federal Court shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court of Appeal or the Federal Court so orders.

[21] Next, it would be s. 97(2) of the Courts of Judicature Act 1964 which states that when granting leave to appeal, the Federal Court may direct a stay of execution of the order appealed against or direct the order to be carried into effect on terms.

[22] And ss. 73 and 102 of the Courts of Judicature Act 1964 also confer on the courts a judicial discretion to grant orders for stay of execution of orders or of proceedings. In the context of the present case, we have duly exercised our judicial discretion in accordance with the established principles and at the same time, having regard to all the circumstances of the present case, we refused to stay the order of the other panel of this court dated 15 November 2006. Way back in 1890 in an old English case of *Attorney-General v. Emerson* [1890] 24 QBD 56, Lord Esher MR said at p. 58 when construing the English Order LVIII r. 6:

> The real question is, what is the construction of this rule? It says: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from or any judge thereof, or the Court of Appeal, may order, and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct'. In all the rules, the word 'may' has been held to mean 'may or may not'. It has been held to give a discretion, which is called a judicial discretion, but is still a discretion.

[23] All the provisions of the law cited above show one singular principle namely that an appeal shall not operate as a stay of execution. This is also reflected in an old English case. It is the English Court of Appeal's case of *Re Flatau ex p Scotch Whisky* Distillers Ltd (1889) 22 QBD 83 where the court refused to grant a stay on the ground that an appeal was pending against the judgment.

[24] There are no definitive parameters within which the court may exercise its discretion. In the final analysis, what would constitute "special circumstances" is purely a question of degree. Each case has to be decided on its own facts. The list of factors constituting "special circumstances" cannot be circumscribed. It will continue to grow as time goes by (*Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and another application* [1993] 4 CLJ 98).

[25] Two common approaches are usually adopted by the courts. The first would be the special circumstances approach while the second is the nugatory approach. The Supreme Court case of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 SC and the Federal Court case of *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 FC adopted the special circumstances approach. *Halsbury's Laws of England*, vol. 13, 4th edn, at p. 272, at para 455 has this to say:

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

[26] It is entirely for the court to decide, on the evidence before it, what circumstances in its opinion constitute special circumstances. According to Edgar Joseph Jr FCJ in *Kerajaan Malaysia v. Dato' Hj Ghani Gilong (supra)*, materials in support of the stay application must be deposed to in the affidavit. This was what his Lordship said:

> We noted, that in instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorised agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay.

[27] In *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353, I refused to grant a stay of execution of my order dated 12 June 1995 because the unsuccessful plaintiff failed to show special circumstances. At p. 356 of the report, this was what I said:

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> The general proposition that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it, must be vigorously applied to *Raja Zainal Abidin (Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116; *The Annot Lyle* [1886] 11 PD 114; and *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406).

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[28] I will now say something about the nugatory approach. It is for the purpose of obtaining a stay pending appeal so as not to render the appeal, if successful, nugatory. In other words, a

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successful appeal should not be rendered futile. The nugatory approach was considered in *Wilson v. Church (No: 2)* [1879] 12 Ch D 454, some 129 years ago. That case concerned the distribution of money to a large number of bondholders. The plaintiff there obtained judgment against the company and the

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court ordered that the money should immediately be distributed among the bondholders. On the defendant's appeal and based on an application to stay pending appeal, the English Court of Appeal ordered a stay. The court was concerned that the appeal, if successful, ought not to be rendered nugatory. The court was

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also concerned about the fund after its distribution. Brett LJ had this to say at p. 459 of the report:

> … the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from

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> being nugatory. That being the general rule, the next question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. Now it seems to me that, looking at this matter in the view of men of business, one cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to

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> persons many of whom will never be able to be found; it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in America; and the practical result of paying this money out to the different bondholders, or to the persons who would be holding the bonds

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> at the time, would be that the fund never could be got back again if the appeal were successful.

[29] Even the Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors (supra)* adopted the nugatory approach when it considered the stay application.

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[30] The Federal Court in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Lim Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 refused to grant a stay because the grounds to show special circumstances were too scanty. A

[31] As promised, I will now revert to the case of *Serangoon Garden Estate Ltd v. Ang Keng (supra)*. This case was referred to by the Court of Appeal in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)* and by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd (supra)*. I have read diligently the case of *Serangoon Garden Estate Ltd v. Ang Keng (supra)* and I have this to say. That case makes reference to special circumstances in considering the stay application and that case too indirectly refers to the nugatory approach which has to be read with the merits of the appeal requirement. That case also says that the nugatory approach and the merits of the appeal requirement are distinct and mutually exclusive to one another in that one without the other would not be sufficient to constitute special circumstances in order to justify a stay. B C D

[32] It is ideal to state that O. 47 r. 1(1) of the RHC as reproduced earlier makes reference to only the special circumstances approach without mentioning, at all, the nugatory approach and the merits of the appeal requirement. It is also ideal to state that Chan Sek Keong JC (as he then was) in *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408 at 415, disapproved the decision of Brown J, in *Serangoon Garden Estate Ltd v. Ang Keng (supra)* because Brown J did not refer to any authority or statute in his judgment. It is also noted that the Court of Appeal in *See Teow Guan* refused to follow the decision of Brown J, in *Serangoon Garden Estate Ltd v. Ang Keng (supra)*. E F G

[33] At the High Court, in the case of *Leong Chee Kong & Anor v. Tan Leng Kee (No: 2)* [2001] 5 CLJ 408, I added two other factors in order to decide whether a stay ought to be granted or not. And that would be whether the applicant will suffer "irreparable damage" and "irremediably injured" if no stay was granted. That was a case where the plaintiffs there would suffer "irreparable damage" and be "irremediably injured" if the estate of the deceased were to fall into the hands of the defendant there and the plaintiffs there would certainly not be able to return to their original positions if the stay was not granted. For that and H I

A other reasons, the stay was granted. On "irreparable damage" as a factor to decide the stay, I had this to say at p. 430 of the report:

> (2) whether irreparable damage would be done to the plaintiffs shouId the stay be refused because the plaintiffs may not be able to obtain the fruits of their litigation?

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Continuing at p. 431 of the report, I had this to say about the "irremediably injured" factor:

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> (4) even in a situation where there are no special circumstances present but where the appellants 'would be irremediably injured if there was no stay should their appeals succeed,' the court would still be empowered and has the discretion to grant a stay (*Development & Commercial Bank Bhd v. Che Wan Development Sdn Bhd & Ors* [1989] 2 CLJ 1200; and *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2)* [1998] 3 CLJ 685).

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[34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed as follows:

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(a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?

(b) the public policy consideration that has to be taken into account;

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(c) the need to examine the subject matter of the appeal;

(d) the need to weigh in a balance of the hardship of the parties involved;

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(e) the delay in filing the application for a stay;

(f) whether the court would exercise its inherent jurisdiction to grant the stay; and

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(g) where would the balance of convenience or the balance of justice lie?

[35] In regard to public policy, Dickens once said that no two lawyers would agree with it and when they discuss it they would contradict one another in less than five minutes. Indeed, Justice Burrough's metaphor about public policy being an unruly horse has been repeated far too often and it rings true. Swinfen Eady J, in

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In re Beard [1908] 1 Ch 383, 386 to 387 has looked upon it as a Pegasus that might soar beyond the momentary needs of the community. The doctrine of public policy has many adherents and it has been accepted and recognised in such cases as *Neville v. Dominion of Canada News Co. Ltd* [1915] 3 KB 556; *Horwood v. Millar's, etc. Co.* [1917] 1 KB 305; *In re Meyrick's Settlement* [1921] 1 Ch. 311; and *Russell v. Russell* [1924] AC 687. It is always the interests of the whole public that must be taken into consideration. But what seems to be in contemplation, in a given case, would be the interest of only one section of the community and a small one at that. Many questions of public policy do not interest the whole community. The courts may have to strike a balance between community interests and sectional interests and they have done so in the past (see Vaughan Williams LJ in *Marlborough v. Marlborough* [1901] 1 Ch 165, 172; Jessel MR in *Printing, etc. Co. v. Sampson* [1875] LR 19 Eq. 462, 465; and Farwell J, in *Wilson v. Carnley* [1908] 1 KB 729, 739 to 740). Public policy varies from one century to another, from one generation to another, and from one country to another. Of importance is this. That public policy subordinates individual gain to public benefit. The value of the doctrine of public policy depends on the judges who administer it and, in this context, I must say that the nation may rest assured that it is in safe hands. Here, public policy dictates that the stay should be refused.

[36] I will now say something about the inherent jurisdiction of this court. It is alluded to in prayer (ii) of encl. 31a and it obtains its statutory strength from O. 92 r. 4 of the RHC which preserves the inherent powers of the High Court and it is also applicable to the Court of Appeal by virtue of r. 4 of the Rules of the Court of Appeal 1994. Order 92 r. 4 of the RHC reads as follows:

> **4 Inherent powers of the Court (O. 92 r. 4)**
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> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[37] Rule 4 of the Rules of the Court of Appeal 1994 states as follows:

> **4 Application of Rules of the High Court 1980**
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> Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply.

[38] Even the Apex Court in the case of *Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473 at p. 475 and in the case of *Jasanusa* as well as the case of *Dato' Hj Ghani Gilong* categorically stated that, in appropriate circumstances, the court could exercise its inherent powers in order to grant a stay. In a tax case, Gunn Chit Tuan SCJ (as he then was) ordered a stay of execution until the determination by the special commissioners of the taxpayer's appeal against the assessments raised against him (see *Chong Woo Yit v. Government of Malaysia (supra)*).

[39] In regard to the balance of convenience or the balance of justice, it was alluded to by Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] AC 396. At the local scene, Mohamed Dzaiddin J (as he then was) in the case of *Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors (No 2)* [1989] 1 CLJ 183; [1989] 1 CLJ (Rep) 436 took into account the balance of convenience of the parties and his Lordship accordingly refused the injunction pending appeal. This was what his Lordship said at p. 498 of the report:

> Secondly, a more serious issue to be considered here is the balance of convenience. Based on the facts and circumstances of the present case, I find that the balance of convenience lay in favour of the injunction pending appeal being refused. I accept the submission of Ms Solomon that the assets of the plaintiff company has depreciated and the longer it remains in its present position, the greater the hardship being inflicted on the defendants. Further, in the event of the plaintiff's claim being dismissed, the assets having been depreciated quite considerably, the defendants may not be able to reap the fruits of their success under the debentures. On the other hand, should the plaintiff succeed in its claim ultimately, for damages, the defendants will have no difficulty in settling the judgment.

[40] In deciding where the balance of convenience or the balance of justice lie, the court has to decide between two competing interests. One interest would be asking for a stay while the other interest is opposing the stay. It is the duty of the court to look at the evidence and decide whether the balance of convenience or the balance of justice is in favour of the applicant or the respondent. If it is in favour of the applicant then the stay would be granted and if it is in favour of the respondent no stay would be granted. Here, the balance of convenience or the balance of justice tilted in favour of the plaintiff appellant. The stay should be refused.

[41] No specific mention was ever made by *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)* nor by *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd (supra)* in regard to the necessity of applying the balance of convenience or the balance of justice in an application for a stay of execution or of proceedings. At the end of the day, the special circumstances approach prevail. By virtue of O. 47 r. 1(1) of the RHC and on the strength of the three Apex Court's decisions of *Dato Hj Ghani Gilong, Jasanusa Sdn Bhd,* and *Re Kong Thai Sawmill (Miri) Sdn Bhd,* it is a correct assertion to say that the special circumstances approach is the correct approach to apply in an application for a stay of execution or of proceedings. And what constitutes special circumstances cannot be itemised with exactitude. It is put at large and it "must be something distinctive and out of the way" *(Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor (supra))*. And in deliberating the stay application, we have vigorously applied the special circumstances approach. We refused to exercise our inherent jurisdiction in favour of the defendant respondent because he refused to obey the order of the other panel of this court dated 15 November 2006. Such refusal cannot be condoned by this panel.

[42] There is an allegation that there was an inordinate delay on the part of the defendant respondent in filing the notice of motion in encl. 31a (see para. 10 of the plaintiff appellant's affidavit in reply affirmed on 15 March 2007). Bearing in mind the date of the Court of Appeal judgment of 15 November 2006 while the notice of motion in encl. 31a was dated 2 March 2007, the delay would exactly be 3 months 17 days. In *Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors.* [1987] 2 MLJ 633, the High Court dismissed an application for an order for stay of proceedings because the delay of four (4) months was held to be too long for the purpose of applying for a stay. In *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822, the Court of Appeal held that the appellant there sluggishly moved the court for a stay. The delay in *Gan Boon Kyee* was more than five (5) months. Likewise here the delay is quite long and it must be held against the defendant respondent.

A **[43]** For the reasons adumbrated above, we unanimously dismissed the notice of motion in encl. 31a for both the prayers, namely, prayers (i) and (ii) with costs. My learned sister Heliliah Yusof, JCA and my learned brother Wan Adnan bin Muhamad, JCA have read this judgment in draft and have expressed their
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